PETITION

FOR A

WRIT OF

CERTIORARI

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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 555

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOUIS Z. GRANT,
KELLAM FOSTER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 555

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Leo Brown, individually and as guardian ad litem for Joseph J. Brown, a minor, and Joseph J. Brown, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review and reverse the order and judgment of the United States Court of Appeals for the Seventh Circuit entered November 20, 1952, dismissing for want of jurisdiction the appeal of petitioners from the judgment of the United States District Court for Northern District of Indiana entered May 28, 1952, and

the order of the United States Court of Appeals for the Seventh Circuit entered December 12, 1952, denying petitioners' motion to vacate said order entered November 20, 1952, and to remand said cause to the United States Court of Appeals for the Seventh Circuit with directions to take jurisdiction of said appeal and to consider and decide said appeal on its merits.

Summary Statement

This case presents the following important questions of Federal law and practice, all of which involve the construction and interpretation of Rule 6 (a), Rule 6 (b), Rule 59 (b), and Rule 73 (a) of the Federal Rules of Civil Procedure, or one or more of these rules.

The first of these questions has been settled by this Court in *Bowman* v. *Loperena,* 311 U. S. 262, 266, but in the present case was decided by the Court of Appeal for the Seventh Circuit in conflict therewith and also in conflict with decisions of courts of appeals of other Circuits as hereinafter set forth.

No question of fact is involved. The undisputed facts are as follows:

On March 22, 1952, respondent Continental Casualty Company as plaintiff filed in the United States District Court for the Northern District of Indiana its complaint against petitioners and against George A. Laipply and Aetna Freight Lines, Inc., a corporation, as additional defendants, for a declaratory judgment that none of defendants have any rights against respondent by reason of an occurrence described in an action of law in the Lake Superior Court at Hammond, Indiana, known as Cause No. 65141 and/or the existence of insurance policy and endorsements described in complaint, alternatively that if on the face of said policy and endorsements the relief prayed is not granted that

(a) policy and endorsements be reformed so as to exclude insurance or coverage for occurrence described in Cause No. 65141 and (b) that under said policy and endorsements so reformed a decree be entered declaring that none of defendants have any rights against respondent by reason of occurrence described in Cause No. 65141 and/or existence of policy and endorsements so reformed (R. 1).

Defendants Aetna Freight Lines, George Laipply and petitioners all filed answers denying respondent's right to relief (R. 34, 36, 38).

After a trial without jury on April 28, 1952, (R. 43) the trial court on May 28, 1952, entered findings of fact and conclusions of law and judgment thereon that none of defendants including petitioners had any rights against respondent under said insurance policy by reason of said occurrence on June 25, 1950 (R. 44).

On June 6, 1952, defendant Aetna Freight Lines, Inc. filed a motion for new trial, or in alternative for order amending judgment, findings of fact, and conclusions of law (R. 49) with affidavit showing deposit of copies of motion in mail on June 6, 1952 addressed to counsel for petitioners and respondent (R. 51).

On June 11, 1952, there was filed petitioner's motion for new trial and for new findings and conclusions and for entry of new decree (R. 52) with affidavit of one of petitioners' counsel that on June 9, 1952 at 5:00 P. M. at Chicago, Illinois, he mailed copies of motion to attorneys for defendants George A. Laipply and Aetna Freight Lines, Inc. and to attorney for respondent at Gary, Indiana (R. 57).

On June 11, 1952, respondent filed a response to petitioner's motion for new trial alleging that under Rule 59 (b) motion for new trial and service must be within 10 days after judgment, that judgment in case was on May

28, 1952; that petitioners' motion was not filed or served until June 10, 1952, more than 10 days after May 28, 1952; that said motion was too late to present any questions; that all matters attempted to be raised in said motion were fully argued and presented at trial and the court properly overruled them, and entered judgment in accordance with law and facts; and moved that petitioners' motion be stricken as filed too late or in alternative be denied (R. 57).

The response was verified by affidavit of respondents' counsel that motion for new trial was evidently mailed to him at Chicago, Illinois on June 9, 1952, and received by him at Gary, Indiana, on June 10, 1952 (R. 58).

On June 12, 1952, was filed affidavit of David H. Kraft, one of petitioners' counsel, in support of motion for new trial, alleging rendition of judgment May 28, 1952, that 10 day period for filing motion for new trial ended Saturday, June 7, 1952, and because said date and Sunday, the following days were non-court days, time for filing motion for new trial officially expired on Monday, June 9, 1952, pursuant to Rule 59, and therefore motion for new trial was properly served and filed, and affiant did not receive copy of decree of May 28, 1952, until June 3, 1952 (R. 58).

On August 1, 1952, more than 30 days after the judgment, the Court entered an order denying motion of defendant Aetna Freight Lines for new trial and amending last rhetorical paragraph of Finding No. 8 of Findings of Fact in judgment of May 28, to read as follows:

> The defendant Aetna Freight Lines, Inc., exercised no control over the tractor operators or their equipment which were under the lease arrangements while the operators were waiting for freight delivery trips. The name of the defendant Aetna Freight Lines, Inc., and Public Convenience and Necessity Permit numbers were painted on Laipply's tractor. An Ohio vehicle license had been issued to Laipply for the tractor.

and otherwise denying the alternative motion for order amending judgment, findings of fact and conclusions of law, and denying motion of petitioners for new trial and for new findings, conclusions and entry of new decree (R. 59).

On August 27, 1952, petitioners filed notice of appeal from judgment of May 28th and said order of August first (R. 62). The other defendants failed to appeal.

On October 28, 1952, petitioners filed a transcript of record with the United States Court of Appeals for the Seventh Circuit.

On October 31, 1952, respondent filed motion to dismiss appeal for want of jurisdiction. (R. 147)

On November 20, 1952, the Court of Appeals for the Seventh Circuit entered an order dismissing appeal for want of jurisdiction (R. 166).

On December 3, 1952, petitioners filed motion to vacate order of November 20, 1952 (R. 167), which was denied by order entered December 12, 1952 (R. 185).

Opinions Below

The District Court for the Northern District of Indiana rendered no opinion, in its judgment of May 28, 1952 (R. 44), nor its order of August 1, 1952, denying motion for new trial (R. 59). The Court of Appeals for the Seventh Circuit included an opinion in its order of November 20, 1952 which is in the Record (R. 166) but not reported and is reprinted here as an appendix to this Petition and Brief.

Jurisdiction

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by U. S. C. Title 28 Sec. 1254 (1).

The Questions Presented

1. Under Rule 73 (a) of the Federal Rules of Civil Procedure where a motion for a new trial is served later than ten days after entry of the judgment appealed from, but the trial Court fails to sustain a motion to strike said motion for new trial as filed too late and entertains said motion for a new trial and after considering it on its merits, denies said motion, does the judgment of the Court as originally entered become final until such denial and the full time for appeal fixed by said Rule 73 (a) commence to run and is to be computed from the entry of said order denying said motion?

2. Under Rule 73(a) of the Federal Rules of Civil Procedure where a motion for a new trial is served by one defendant within ten days after the entry of the judgment appealed from, and a separate motion for a new trial is served by another defendant later than ten days after the entry of said judgment and both motions are entertained, considered on their merits and denied in one order, does the full time for appeal fixed by said Rule 73 (a) commence to run and is to be computed from the entry of said order denying both motions even though the defendant serving the motion for new trial within 10 days after the judgment does not appeal?

3. In computing the ten day period for service of a motion for new trial after entry of judgment under Rule 59 (b) of Federal Rules of Civil Procedure pursuant to Rules 6 (a) and 6 (b) thereof, if the tenth day of said period falls on Saturday, will this period extend until and including the following Monday?

Reasons Relied On for Allowance of Writ of Certiorari

1. The decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court on the same

point, viz., *Bowman* v. *Loperena,* 311 U. S. 262, 266, and *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 137-138.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of the United States Court of Appeals for the First Circuit on the same point, viz., *Denholm & McKay Co.* v. *Commissioner of Internal Revenue,* 132, F. 2d 243, 246-247; and with the decision of the United States Court of Appeals for the Eighth Circuit on same point in *Babler* v. *United States,* 137 F. 2d, 98, 99.

3. The decision of the Circuit Court of Appeals is in direct conflict with the Seventh Circuit's prior decision on the same point, viz., *United States* v. *Schlotfeldt,* 136 F. 2d, 935, 937. Certiorari denied 327 U. S. 781.

4. Important questions of federal law and practice are presented, involving the proper construction and interpretation of the Federal Rules of Civil Procedure, on appellate matters involving not only the right of petitioners to have their appeal considered on its merits, but which will arise in similar cases pending in other circuits. Petitioners were prevented from filing Notice of Appeal within 30 days after judgment by the delay of trial Court in passing on the motion for new trial.

If as in this case, a trial court would entertain a motion for new trial filed after the 10 days period, consider it on its merits and withhold its decision on that motion until after 30 days from the entry of the original judgment, it would be impossible for an appellant to file notice of appeal within the 30 day period with any degree of assurance as to the nature or the existence of the judgment appealed from. The Court in acting on such a motion might modify the judgment or sustain the motion for new trial and set aside the judgment. Moreover, filing a notice of appeal

would divest the trial court of further jurisdiction even to decide the motion of a new trial.

A similar but even more difficult situation would arise in the event of two separate motions for a new trial, by different parties one filed within the 10 day period, the other thereafter. Until both motions had been acted on there would be no assurance as to the nature of the judgment or even its existence.

A notice of appeal by one party might divest the Court of jurisdiction to decide even the motion for new trial filed in time.

Rule 73 (a) mentions only a "timely motion", without specifying by whom such a motion should be made, whether by a party afterwards taking an appeal or by anyone else. If a timely motion were filed by any party to the case this would stay the time until it was decided regardless of the party taking this appeal.

While the principle controlling this situation was definitely settled by this Court in *Bowman* v. *Loperena*, 311 U. S. 262, 266, this diversity of interpretation of these Rules of Federal Court Procedure between the Circuit Court of Appeals for the Seventh Circuit in the present case and those of other Circuits exemplified by the authorities hereinabove set forth, can lead only to confusion which should be prevented by the authoritative decision of this Court. The question therefore is of broad, general interest.

The question of computations of time under Rules 6 (a) and 6 (b) when the last day of time falls on Saturday is of general interest. Saturday at present is in effect a dies non so far as Court matters are concerned, with Courts and Clerks' offices generally closed. An authoritative statement of this Court is necessary to clarify these Rules on this question.

A supporting brief accompanies this petition.

WHEREFORE petitioners respectfully pray that this Honorable Court issue a writ of certiorari as hereinbefore prayed.

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

By LOUIS Z. GRANT,
KELLAM FOSTER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Specification of Errors

1. The Court of Appeals for the Seventh Circuit erred in its order and judgment of November 20, 1952, dismissing (R. 166) petitioners' appeal for want of jurisdiction.

2. The Court of Appeals for the Seventh Circuit erred in its order of December 12, 1952, denying petitioners' motion to vacate order and judgment entered November 20, 1952.

I

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with decisions of this Court on the same point.

The Court of Appeals for the Seventh Circuit in its decision of November 20, 1952, overlooked the following undisputed facts in the proceedings before the trial court. On June 11, 1952, respondent filed a response to petitioners' motion for new trial alleging that said motion was too late to prevent any question; that all matters attempted to be raised in said motion were argued and presented at trial and that Court overruled them, and entered the findings, conclusions, and judgment in accord with law and facts with the motion that petitioners' motion for new trial be stricken as filed too late or in the alternative denied (R. 57).

Petitioners' motion for new trial never was stricken, but the trial Court on August 1, 1952, over 30 days after the judgment, entered its order denying petitioners' motion for new trial and also motion for new trial of defendant Aetna Freight Lines, Inc., but sustaining motion of said defendant to amend judgment, findings of fact and conclusions of law to the extent of modifying Finding No. 8 (R. 59). In so doing

the trial court failed to act on respondent's motion to strikke petitioners' motion for new trial as filed too late but afteer retaining it over six weeks denied it on its merits over ome month beyond the thirty day period after the date of judgment (May 28, 1952).

Accordingly, this case is governed by the rules stated iin *Bowman* v. *Loperena,* 311 U. S. 262, 266, and in *Wayme United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 132-137-8.

The decision of the Court of Appeals is directly in conflict with these authorities.

II

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the decisions of the Court of Appeals in other circuits on the same point.

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the Seventh Circuit's prior decision on the same point.

The decision of the Court of Appeals for the Seventh Circuit on this question is in direct conflict with the decisions of Courts of Appeals of the following circuits on the same question, namely:

Denholm & McKay Co. v. *Commissioner of Internal Revenue,* 132 F. 2d 243, 246-247, (First Circuit);

Babler v. *United States,* 137 F. 2d 98, 99 (Eighth Circuit).

The decision of the Court of Appeals for the Seventh Circuit is likewise in direct conflict with a prior decision in the Seventh Circuit on the same point, viz., *United States* v. *Schlotfeldt,* 136 F. 2d, 935, 937, certiorari denied, 327 U. S. 781, which held in a similar case that Federal Rules of Civil Procedure Nos. 6, 59 and 60 did not require a contrary ruling.

III

The retention of both motions for a new trial by the trial judge for over six weeks before he denied them on August 1, 1952, over two months after the judgment on May 28, 1952, rendered impossible the filing of a notice of appeal within 30 days after the judgment. Petitioners should not be prejudiced by this delay occasioned through no fault of their own.

If a notice of appeal was filed within 30 days after entry of judgment while motions for new trial were pending whether timely or not, the nature or even the existence of the judgment appealed from would be uncertain until the trial court should pass on the motions for new trial.

The filing of a notice of appeal under such circumstances would divest the trial court of jurisdiction to make further orders or even to pass on the motions for a new trial.

Rule 73 (a) Federal Rules of Civil Procedure.

Jordan v. *Federal Farm Mortgage Corporation,* 152 F. 2d 642, 644; certiorari denied 328 U. S. 821; certiorari dismissed 328 U. S. 852;

Bergeron v. *Mansour,* 152 F. 2d 27, 31;

Daniels v. *Goldberg,* 8 F R D 580, 581, aff'd 173 F. 2d, 911;

Smith v. *Pollin,* 194 F. 2d 349, 350;

United States v. *Radice,* 40 F. 2d 445, 446.

To sustain the decision of the Circuit Court of Appeals would force a litigant who had failed to file a timely motion for a new trial, to file a notice of appeal from the judgment within 30 days, regardless of what action the trial court took on his motion or when it did so. This doctrine would have strange consequences which would be extremely unfair to petitioners here. In this case the trial judge held petitioners' motion for a new trial for over six weeks, long

after the expiration of the 30 day period for filing notice of appeal before he entered the order of August first, denying their motion as well as the motion for new trial of defendant, Aetna Freight Lines, Inc., conceded to be timely (R. 51). Until the Court had acted on both motions, it would have been impossible to determine whether the judgment would stand, be modified, or even be set aside for a new trial. It would hardly have been fitting for the parties or their counsel to have pressed for an early decision on their motions the time for which was wholly in the discretion of the trial Judge.

It would have been difficult for any one to have prepared intelligently or filed a notice of appeal from a judgment, which no one could know, would be sustained, modified, or even set aside by the Trial Court in his order on the motions for a new trial.

However, the filing of a notice of appeal under the decisions hereinbefore cited on this point would have divested the trial court of jurisdiction and prevented further action by the trial judge even to the extent of deciding the motion for a new trial.

We submit that such consequences of the Court of Appeals decision, if permitted, would invite confusion and are not contemplated nor warranted by any statute or rules of court.

IV

If a timely motion for a new trial were filed by any party, this would stay the running of the time for appeal, regardless of whether the party filing the motion took the appeal.

Rule 73 (a) of Federal Rules of Civil Procedure.

Rule 73 (a) above cited provides, "The running of the time for appeal is teminated by a timely motion", but does

not state by whom such motion should be made, or whether it should be made by a person subsequently taking an appeal. The motion for new trial of Aetna Freight Lines, Inc., conceded as timely, was denied by and in the same order denying petitioners' motion for new trial (R. 59). As we have shown under Point III of the Brief, until both these motions were disposed of, the terms or even the existence of the judgment would have been uncertain, and would hardly be a proper basis for an appeal.

Accordingly, the only reasonable construction of Section 73 (a) is that the running of the time for appeal is terminated by a timely notice of appeal, regardless of whether the party filed this appeal after the overruling of the motion. To hold otherwise amounts to reading into the Rule that which is not there.

V

The motion for new trial was served in proper time.

If the tenth day of the ten day period for service of motion for new trial falls on Saturday, this period will extend until and including the following Monday.

Rules 5 (b), 6 (a) and 6 (b) of Federal Rules of Civil Procedure.

Rule 59 (b) of Federal Rules of Civil Procedure.

Union National Bank of Wichita, Kansas v. *Lamb*, 337 U. S. 38.

Reliance Life Ins. Co. v. *Burgress*, 112 F. 2d, 234, 240.

Jacobs Pharmacy Co. v. *U. S.*, 71 F. Supp. 584, 585.

The motion for new trial was served in proper time. The tenth day after the judgment of May 28, 1952 (R. 44) fell on Saturday, June 7, 1952. Copies of petitioners' motion for new trial were deposited in the mails addressed

to opposing counsel on June 9, 1952 (R. 57). Under Rule 5 (b) of Federal Rules of Civil Procedure service on opposing counsel was complete on deposit of the copies in the mails.

In view of the fact that Courts and Clerks' offices are usually closed on Saturdays, Saturday is in effect a legal holiday, a dies non, and being the last day of the ten day period should not be counted. The next day to be counted was Monday, when the copies were mailed. Service within the 10 day period is sufficient even though motion for new trial is not filed until after the expiration of the 10 day period under *Reliance Life Insurance Co.* v. *Burgress* 112 F. 2d, 234, 240.

Respectfully submitted,

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

By LOUIS Z. GRANT,
KELLAM FOSTER,
Counsel for Petitioners.

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit.

Before

Hon. Philip J. Finnegan, Circuit Judge, Hon. N. Nathan Swaim, Circuit Judge.

Continental Casualty Company, a corporation, (hereinafter designated as Continental) appears specially to present its motion to dismiss appeal filed in the above entitled cause by the Browns, defendants-appellants, (hereinafter designated as the Browns). A petition supporting the motion makes the following representations:

Continental filed its action in the United States District Court for the Northern District of Indiana, Hammond Division, for a declaratory judgment against the Aetna Freight Lines, Inc., its insured, a motor truck owner and driver named Laipply and the Browns. The complaint sought a declaratory judgment that there was no liability insurance coverage by Continental as to any defendant for an occurrence that injured Brown, Jr., while Laipply was driving his own tractor-truck on a personal pleasure mission. Each defendant filed an answer to the complaint.

A declaratory judgment was entered on May 28, 1952, finding in substance that under the facts and circumstances of the case none of the defendants come within the purview of the policy of insurance issued by Continental. Laipply has not appealed. Aetna Freight Lines, Inc. filed an alternative motion for a new trial or for an amendment of the judgment to provide that Continental, although affording no insurance coverage for the occurrence that caused the injury to Brown, Jr., was under a contractual duty to pay the expenses of Aetna Freight Lines, Inc., in defending against the Brown claims. That motion was overruled and Aetna has not appealed.

On June 11, 1952, more than ten days after the judgment was entered, the Browns filed a motion for a new trial. On August 1, 1952, their motion for new trial was overruled. On August 27, 1952, they filed their notice of Ap-

peal. On October 28, 1952, they filed the record in this court.

Continental, by its motion, seeks the dismissal of the appeal because the motion for a new trial was not served in accordance with rule 59 (b) of the Federal Rules of Civil Procedure, which provides: "A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

Brown's motion for a new trial was sent to counsel for Continental on June 9, 1952, through the United States mail, and he received it on June 10, 1952.

It appears that said motion was not served in accordance with rule 59 (b) of the Rules of Civil Procedure in that service on June 10, 1952 was not within 10 days from the date of judgment, as provided in said rule.

Since the Browns did not serve and file a timely motion for a new trial, nor take their appeal within 30 days from the entry of the declaratory judgment, their right to appeal was lost.

(S.) PHILIP J. FINNEGAN,
United States Circuit Judge.
(S.) H. NATHAN SWAIM,
United States Circuit Judge.

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No. 555

IN THE

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October Term, A. D. 1952

LEO BROWN, individually and as guardian ad litem for Joseph J. Brown, a minor, and JOSEPH J. BROWN,

Petitioners,

v.

CONTINENTAL CASUALTY COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALBERT H. GAVIT,
504 Broadway,
Gary, Indiana,
Attorney for Respondent, Continental Casualty Co.

Central Publishing Company, Indianapolis, Ind.

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SUMMARY OF ARGUMENT

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I.

The record in this cause was served out of time. (5 to 6 herein)

II.

Browns err in their assertion that the Circuit Court decision conflicts with decisions of this court. (6 to 7 herein)

III.

Browns err in their assertion that the Circuit Court decision conflicts with decisions in other Circuits or with its own decisions. .....(7 to 8 herein)

IV.

Browns err in their assertion they could not appeal until the trial court disposed of their motion and that of Aetna. .....(9 to 11 herein)

V.

Browns err in their assertion that if any defendant files a motion that stays the appeal time as to him, this automatically extends the appeal period for all defendants even though the others file nothing, and even though the party who filed the timely motion does not appeal. .....(11 to 15 herein)

VI.

Browns err in their assertion that their motion for a new trial was served in proper time. (15 to 16 herein)

No. 555

IN THE

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LEO BROWN, individually and as guardian ad litem for Joseph J. Brown, a minor, and JOSEPH J. BROWN,

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CONTINENTAL CASUALTY COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

(References are to the printed record)

Respondent (Continental Casualty Company), sued Browns (petitioners) for declaratory relief that their personal injury claims were outside the coverage of an automobile liability policy and "riders" it had issued to one Aetna Freight Lines, Inc. (a contract motor vehicle freight carrier).

The gravamen of that complaint was that one Lapply, who hauled freight for Aetna in a trailer, had driven his

own tractor-truck without a trailer from Aetna's Chicago terminal over into Indiana to attend a movie, and while driving alone on that personal mission had injured Brown, Jr. This occurrence, the complaint alleged, was outside the policy provisions. (Rec., pp. 1 to 34)

To that basic Continental-Brown controversy, Aetna and Laipply were joined as defendants.

Petitioners err in stating the case was commenced March 22, 1952. The date was March 22, 1951. (Rec., p. 1)

Petitioners overlook in their summary statement that each defendant in his separate answer prayed affirmative and separate relief against Continental.

Browns asked for a construction of the policy and a decree that if they recovered judgment against either Laipply or Aetna they have a right to proceed against Continental. (Rec., p. 42)

Laipply and Aetna prayed for an order requiring (a) Continental to defend them against the Browns, and (b) that Continental be ordered to pay any judgment Browns might recover. (Rec. pp. 36 and 37-38)

In the Circuit Court, Browns disclaimed any interest in who should defend Aetna by saying in their brief

> "no reason arises for declaratory relief to determine such moot and settled question"

and that as to them such issue

> "could not stand as a ground for invoking the jurisdiction of the court for declaratory relief"
>
> (Page 6, Petitioners' Circuit Court Brief on Motion to Dismiss.)

After trial, the district court on May 28, 1952, decided against the defendants' separate affirmative prayers. Its decree reads:

> "Upon the foregoing Findings of Fact and Conclusions of Law, it is now adjudged and declared that none of the defendants, George A. Laipply, Aetna Freight Lines, Inc., Joseph J. Brown, Leo Brown, as next friend of Joseph J. Brown, a minor, and Leo Brown, have any rights of any kind against the plaintiff under the policy of insurance described in the foregoing Findings of Fact and by reason of the occurrence on June 25, 1950, described in the said findings. . . ." (Rec., p. 49)

That judgment was never modified in any way.

Laipply (the tractor owner and driver) filed nothing more. Within ten days Aetna filed a restricted alternative motion which the Circuit Court described as:

> "an alternative motion for a new trial or for an amendment of the judgment to provide that Continental, although affording no insurance coverage for the occurrence that caused the injury to Brown, Jr., was under a contractual duty to pay the expenses of Aetna Freight Lines, Inc. in defending against the Brown claims."

The grounds of that motion were directed at the question of Continental's alleged obligation to defend Aetna, and the findings that Laipply was on a pleasure mission were accepted. (Rec., pp. 49-51)

Browns did nothing at all within ten days after the entry of decree, but on the twelfth day (Monday, June 9, 1952) mailed from Chicago to Indiana their new trial motion. (Rec., p. 57)

They admitted in the trial court

> "that the 10 days thereafter for the filing of the motion for a new trial ended Saturday, June 7, 1952"

but claimed Saturdays were dies non and hence that a Chicago mailing on the following Monday met time requirements. (Rec., pp. 58-59)

Continental on June 11, 1952, moved the trial court to strike the Browns' new trial motion as tardy or alternatively to overrule it. (Rec., pp. 57-58)

On August 1, 1952, the trial court corrected a clerical error in Finding No. 8 and overruled the Brown and Aetna motions. (Rec., pp. 59-61) Browns alone filed notice of appeal. (Rec., p. 62)

On Continental's motion the Circuit Court on November 20, 1952, dismissed Browns' appeal as tardy and on December 3, 1952, refused to vacate that dismissal. (Rec., pp. 166-167 and 185)

The evidence that Laipply was on this personal movie mission was undisputed (Rec., pp. 78-88) and the alleged obligation to defend under the policy pertained only to Aetna. (Rec., pp. 9-10)

ARGUMENT

Browns' certiorari petition assigns but three questions (orig. pp. 5 to 6 thereof), but their brief assigns five grounds (orig. pp. 9 to 14 thereof).

Precedents and a rule of this court restrict Browns to the precise questions in the petition itself and accordingly only those are involved.

Further, since Browns make no point of the trial court's correction of the clerical error in Finding No. 8, respondent passes that question.

Similarly, it is to be noted that Browns cannot reach the ruling of the Circuit Court unless upon the whole record they show that their substantial rights were affected.

> Rule 61 of Rules of Civil Procedure, 28 U. S. C. A., Sec. 2111.

Subject to the foregoing, respondent thus answers Browns' brief:

I

THE RECORD IN THIS CAUSE WAS SERVED OUT OF TIME

The Circuit Court dismissed this appeal November 20, 1952 (Rec., pp. 166-167).

Petitioners filed their certiorari petition and with a brief and the typewritten record and served all except a copy of the record on January 21, 1953.

By rule 38 (3) of this court the printed record was to be served within 10 days thereafter.

It was not served until February 28, 1953. Respondent has had no notice of any application to extend the time for service or of the granting thereof and therefore assumes there was no extension.

II

BROWNS ERR IN THEIR ASSERTION THAT THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Browns contend the decision below conflicts with *Bowman v. Loperena*, 311 U. S. 262 with *Wayne United Glass Co. v. Owens-Illinois Glass Co.*, 300 U. S. 132.

There is no such conflict because:

(1) The present amended Rule 73a restricts consideration to "timely" motions. It therefore necessarily supersedes all prior cases such as *Bowman* and *Wayne Glass* that dealt with "entertaining" tardy motions.

(2) Under the present rule direct precedents of this tribunal deny any power in a trial court to "entertain" anything not expressly assigned within ten days.

> Johnson v. New York, N. H. & H. R. Co. (1952), — U. S. —, 79 S. Ct. 125, 127, and cases there cited.

(3) *Bowman* and *Wayne Glass* were bankruptcy cases where, because of the absence of court terms, the trial court had a continuing revisionary power and could, if it saw fit, "entertain" a motion at any time.

The current Rule 73a as amended eliminates, however, all questions of tardy "entertaining" and denies any such power in the courts.

> **Rule 73a as amended and Notes of Advisory Committee thereon;**

Brennan v. Hawley Products Co. (7th), 182 Fed. (2nd) 945, cert. denied 340 U. S. 865, 71 S. Ct. 89;
Francis v. So. Pac. Co. (10th), 162 Fed. (2d) 813, aff'd 333 U. S. 445;
Fine v. Paramount Pictures (7th), 181 Fed. (2d) 300;
Marshall's U. S. Auto Supply, Inc. v. Cushman (10th), 111 Fed. (2d) 140, cert. denied 311 U. S. 667;
Safeway Stores, Inc. v. Coe (App. D. C.), 136 Fed. (2nd) 771;
Freid v. McGrath (App. D. C.), 133 Fed. (2nd) 354.

III

BROWNS ERR IN THEIR ASSERTION THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH A DECISION OF THE SEVENTH CIRCUIT ITSELF

To this contention Browns cite *Denholm & McKay Co. v. Com. of Internal Revenue,* 132 Fed. (2nd) 243, 246-247, in the 1st Circuit, and *Babler v. U. S.,* 137 F. (2nd) 98, 99, in the 8th Circuit.

Neither conflicts with the decisions below and both were before the present Rule 73a which denies jurisdiction over tardy motions.

McKay mentioned no rule of Civil Procedure and therefore can construe none. It was an appeal from the then Board of Tax Appeals.

Insofar as it has the slightest pertinency it supports the decision below by holding that where the time for a motion has passed, the trial court cannot after the appeal period

entertain the motion, and if it does so, its act is void jurisdictionally and does not toll the appeal period.

The *Babler* case is even more remote because the trial court had expressly kept the finality of its judgment open. Further, *Babler,* says the Notes of the Advisory Committee, is no longer acceptable under Amended Rule 73a.

Petitioners claim the decision below conflicts within the 7th Circuit itself with *U. S. v. Schlotfeldt,* 136 Fed. (2nd) 935, cert. denied, 327 U. S. 781.

Passing the question of whether a court can legally conflict with itself, *Schlotfeldt* antedated the present amended Rule 73a which denies jurisdiction to "entertain" tardy motions. As to the present rule, the Advisory Committee's Notes state:

> "Rulings or dicta to the contrary as in U. S. v. Schlotfeldt (CCA 7th 1943), 136 Fed. (2nd) 935; Babler v. U. S. (CCA 8th 1943), 137 Fed. (2nd) 98, dictum . . . are not acceptable in light of these considerations . . ."

The 7th Circuit itself clearly recognizes that under the present amended rule, tardy motions do not toll the appeal period.

> Brennan v. Hawley Products Co. (7th), 182 Fed. (2nd) 945, cert. denied 340 U. S. 865;
>
> Fine v. Paramount Pictures (7th), 181 Fed. (2nd) 300.

IV

BROWNS ERR IN ASSERTING THEY COULD NOT APPEAL UNTIL THEIR UNTIMELY MOTION WAS DECIDED AND UNTIL AETNA'S SEPARATE AND TIMELY MOTION WAS DECIDED

Browns argue that (a) their own untimely motion prevented an appeal, and (b) that Aetna's timely but restricted motion prevented a Browns appeal.

As to their contention that their own untimely motion somehow tolled their appeal period until it was overruled, this, if sustained, would abrogate the present Rule 73a restricting jurisdiction of trial courts to timely motions and would re-establish the discarded rule as to "entertaining" tardy ones.

Most certainly no one lulled Browns into believing their tardy motion was effective because only one day after it was filed Continental filed its motion to strike the Browns motion as tardy. (Rec., pp. 57-58)

All the authorities belie any justifiable concern by Browns that somehow the court might sustain their untimely motion and thereby obviate an appeal because the cases are uniform that any such attempt by the trial court would be beyond its jurisdiction.

Safeway Stores, Inc. v. Coe, (App. D. C.) 136 F. (2d) 771;
Marshall's U. S. Auto Supply v. Cushman, (10th) 111 F. (2d) 140, cert. denied 311 U. S. 667;
Freid v. McGrath (App. D. C.), 133 F. (2d) 350.

The 7th Circuit is itself on record there no longer can be any "entertaining" of tardy motions.

Brennan v. Hawley Products Co. (7th), 182 Fed. (2d) 945, cert. denied, 340 U. S. 865, 71 S. Ct. 89; Fine v. Paramount Pictures (7th, 1950), 181 F. (2d) 300.

Browns would have the appeal period controlled by the parties and not by rule. Under their theory a party could at any time revive an expired appeal privilege by the simple expedient of any untimely motion.

Browns had a clear option. They could either file notice of appeal within 30 days after May 28, 1952, or if they desired more time, they could within 10 days after decree serve a motion that would extend their appeal time. Having done neither they cannot complain of their own decision. Neither Aetna nor Continental nor the court itself could or did control either of those steps.

Browns' cases are not in point. *Jordan v. Fed. Farm Mtg. Corp.*, 152 F. (2d) 642, holds that only in strictly two party litigation, a party who has himself already appealed cannot later file a motion for a new trial.

Bergeron v. Mansour, 152 F. (2d) 27, is to the same effect; that is, a party who has himself already appealed cannot re-argue his motions in the trial court.

Daniels v. Goldberg, 173 F. (2d) 911, mentions no rule of Civil Procedure.

Smith v. Pollin, 194 F. (2d) 349, adheres to the rule that a party who has himself appealed can file nothing below, but holds that if he learns of grounds for a new trial for newly discovered evidence he is not without a remedy and may move to remand the case to the trial court.

U. S. v. Radice, 40 Fed. (2d) 445, 446, was decided in 1930 before any Rules of Civil Procedure were adopted.

Browns say that they should not be prejudiced by any delay of the trial court in acting on their motion.

In the first place no delay on an untimely motion can prejudice anyone; in the second place they claim no effort on their part urging an immediate ruling; in the third place their trial court counsel asked a delay in the ruling.

Browns postpone their discussion of the effect of Aetna's restricted and timely motion to subdivision IV of their brief. Respondent adopts a like practice.

V.

BROWNS ERR IN THEIR ASSERTION THAT IF ANY DEFENDANT FILES A MOTION THAT STAYS THE APPEAL TIME AS TO HIM, THIS AUTOMATICALLY EXTENDS THE APPEAL PERIOD FOR ALL DEFENDANTS EVEN THOUGH THE OTHERS FILE NOTHING AND EVEN THOUGH THE PARTY WHO FILED THE TIMELY MOTION DOES NOT APPEAL.

Browns cite no precedent they even claim sustains their contention. None exists that an appealing defendant can take advantage of an extension of time procured by a non-appealing one.

Browns overstate the question. It is actually a very narrow one.

Aetna accepted the determination that Laipply was a stranger to it in the occurrence and complained only that Continental should defend it.

> Central Surety and Ins. Co. v. Morris (5th), 103 Fed. (2d) 116;

Ocean Accident and Guarantee Corp. v. Heald, (D. C. E. Pa.), 30 Fed. Supp. 991.

As decided in the *Heald* case, if Aetna had been sustained in that claim, relief would have been limited to that one issue between Aetna and Continental.

Browns make no claim here of any interest in that Continental-Aetna issue.

From the denial of that relief Aetna did not appeal and the appeal of Browns from the denial of affirmative and other relief to them is utterly foreign to that Aetna-Continental controversy.

Accordingly, on this record, the question is only:

> Does one defendant's motion for limited relief from a judgment on an issue only between him and the plaintiff and from the denial of which he does not appeal, toll the appeal period as to another defendant who did not join therein, but who seeks to appeal on other grounds from a denial of affirmative relief to him against the plaintiff.

Nothing in Aetna's motion touched the Brown-Continental litigation at all. It could have been granted in its entirety with no change in their situation. Nothing in it prevented Browns pursuing any remedies by appeal or otherwise they thought available.

By reason of their non-joinder of Aetna in the appeal, Browns cannot and do not contend that Aetna is in any respect interested in the separate and distinct Brown-Continental controversy.

Fine v. Paramount Pictures (7th), 181 Fed. (2d) 813 expressly decides that even as to Aetna itself had it appealed it could have no relief on an unassigned ground.

Very recently this court itself has re-affirmed that even as to an appealing party his relief is restricted to that he specifically assigned below.

> Johnson v. New York, N. H. and H. R. Co. (1952), — U. S. —, 73 S. Ct. 125.

Browns however argue that an appealing party may adopt an unassigned ground of a non-appealing party and thereby not only toll his own appeal time but present that unassigned ground for review.

Direct precedent denies that a timely motion by one defendant tolls the appeal period as to all.

That is *Continental Casualty Co. v. U. S. for use of Schaefer,* 167 Fed. (2d) 107, cert. denied 337 U. S. 940, 69 S. Ct. 1517. It decides that even where all defendants appeal, a timely motion by one tolls the appeal time as to the others only on an issue that cannot be resolved in favor of that one without in justice giving the same relief to all. As to an issue not so controlled its holding is that no one can thus secure a time extension by a motion by anyone but himself.

Zimmern v. U. S. (5), 79 Fed. (2d) 703, rev'd on other grounds 298 U. S. 167, 56 S. Ct. 706, also decides that even a timely motion by one appellant does not toll the appeal period as to others.

Everything Aetna asked in its restricted motion could have been granted with no effect on Browns who had no possible interest in who must defend Aetna. The basic trial court findings that Aetna had no connection with Laipply on his movie mission were as favorable to Aetna as to Continental and all those Aetna accepted.

Surely, if Continental had sued Aetna alone on the one issue of who must defend Aetna against the Browns

but had joined the Browns in its complaint, a motion to dismiss by Browns for failure to state a cause of action against them would have had to be sustained.

If the rules are to be construed as Browns argue they should, the door is open to endless litigation over their meaning.

Thus, if one of multiple defendants file a timely motion for new trial and later concludes to withdraw his motion and does so, co-defendants such as the Browns might then be here urging that although they filed nothing at all in the trial court their appeal period ran from the withdrawal of another defendant's timely motion.

Procuring an extension of time for an appeal should be and is an individual undertaking just as procuring an extension of time to plead applies only to the party securing that extension.

The Browns' assertion in their petition for certiorari (but not in their brief) that "important questions of federal law and practice or presented" merits only passing attention.

In the first place, if the question be "important" it has been definitely settled by *Continental Cas. Co. v. U. S., etc.* 167 F. (2d) 107, cert. denied 337 U. S. 940.

In the second place, the rules themselves settle it. Browns would have the certainty of the rule abandoned in favor of a rule that "sometimes" a timely motion by a non appealing defendant tolls the appeal period as to another defendant and "sometimes" it does not.

It is submitted that when, as and if any such amendment becomes proper, it should be done only by an express

amendment of the very rules themselves and that their present form permits no such construction.

The bench and bar presently understand the rule. Any permitted deviation from it can only lead to the confusion the Browns profess to fear.

VI.

BROWNS ERR IN THEIR ASSERTION THEIR MOTION FOR A NEW TRIAL WAS SERVED IN PROPER TIME

This last subdivision of Browns' brief contends that if the last day for serving a new trial motion falls on a Saturday, the 10-day period is extended to include the following Monday.

They cite as supporting that contention *Union Nat'l Bank of Wichita, Kansas v. Lamb,* 337 U. S. 38, 69 S. Ct. 911. That, however, was a Sunday and not a Saturday case.

They overlook the rule:

> "A half holiday shall be considered as other days and not as a holiday."
>
> Rule 6a

and *Casalduc v. Diaz* (1st), 117 Fed. (2d) 915, cert. denied, 314 U. S. 639, 86 L. Ed. 512, with its express holding that when Saturday is the last day for an act even if the clerk's office be closed the time is not extended.

Browns make no claim there is any Saturday closing practice in the office of the District Court Clerk at Hammond, Indiana, or in that of Continental's counsel at Gary, Indiana, nor do they claim that either of those offices were in fact closed on Saturday, June 7, 1952. Similarly, they

make no claim that the United States Post Office in Chicago, Illinois, was not open on that date for mailing their motion.

A denial of Browns' petition is prayed.

Respectfully submitted,

Albert H. Gavit

ALBERT H. GAVIT,
504 Broadway,
Gary, Indiana,
Attorney for Respondent,
Continental Casualty Co.

ALBERT H. GAVIT,
Attorney for Respondent,
504 Broadway,
Gary, Indiana